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ABSTRACT

This paper discusses how trends in school racial desegregation suggest a move back toward segregation. Courts are more willing now to attribute these patterns of racial segregation to demographic changes in residential housing markets rather than to past vestiges of the segregated system as they had done in the past. School officials and community leaders still must grapple with increasing patterns of racial segregation in schools and gross disparities in both educational experience and outcomes. After giving historical background on court decisions, desegregation, and school choice, the paper focuses briefly on a Massachusetts controversy on race choice in schools, and issues involving vouchers and school choice. The future of unitary status of schools is then considered. School districts in Little Rock, Arkansas, are used as an example in which statistics are continually gathered to monitor compliance with desegregation orders. As desegregation is achieved across the nation, funds can be utilized to increase equity and access across all population groups. However, school districts will have to confront social, economic, and racial segregation in schools as a barrier to equity and excellence. Funding problems in a cyclical economy will also present challenges to districts, requiring federal intervention. (Contains 36 references.) (RT)

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Desegregation, Unitary Status and Vouchers.

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Desegregation, Unitary Status and Vouchers

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Desegregation, Unitary Status, and School Choice

Overview. One can argue more recent court decisions in school desegregation cases mark a shift in the federal courts' perspective on local district accountability toward maintaining racially balanced schools. As courts declare more and more school districts unitary, and therefore, released from court oversight, old questions are being raised again about school board accountability for racially segregated schools and the constitutionality of school choice programs, particularly those involving religious schools. However, today, courts are more willing to attribute patterns of racial segregation to demographic changes in residential housing markets rather than to past vestiges of the segregated system as they had done in the past. Indeed, in a few cases, school boards have put forward school choice plans, once viewed constitutionally suspect, as a means to gain release from court oversight. Several schools districts, declared unitary by the courts, have proposed control choice plans, involving magnets schools, as a way of maintaining desegregation in the post-desegregation era. In these districts, parental outrage about the expense and inconvenience of busing has subsided as "voluntary" busing for choice has replaced "mandatory" busing for desegregation. Nevertheless, school officials and community leaders still must grapple with increasing patterns of racial segregation in schools, and gross disparities in both educational experience and outcomes. Moreover, in this seemingly new era of school choice, who is accountable for segregated schools in the post desegregation era, remains a significant and unresolved question.

Background: Courts, Desegregation, and Choice

Thirty years ago, the Supreme Court and federal district judges questioned the legitimacy of using parental choice, then referred to as "freedom of choice plans," as a mechanism for developing non-segregated schools, providing relief to African American school children long denied their constitutional rights. In the decades following the *Brown* decision, school districts established "freedom of choice plans," where parents could chose to send their child to a school nearest their residence, or second nearest, as a good faith effort toward establishing a non-racial basis for student assignment. In most southern states, pupil assignment laws, quickly passed by state legislatures in response to the *Brown* decision, allowed school boards to approve or deny school transfer requests. With that power, school boards could then deny African American parents' requests to send their children to all white schools "legally," citing grounds other than race. In Florida, school officials could base pupil assignment on such factors as the child's social

economic status, cultural background, and psychological disposition. Prior to the 1960s, a few federal judges took issue with these pupil assignment laws, stating they could not be used as evidence of good faith compliance (*Gibson el al. v. Dade County,* 1959). However, it was not until after the passage of the 1964 Civil Rights Act that federal courts began to demand school board accountability for creating and maintaining a desegregated system.

During the mid to late 1960s, the Fifth Circuit Court of Appeals ruled that school boards had an affirmative duty to create an integrated school system (*Singleton v. Jackson,* 1966; *United States v. Jefferson County,* 1966). In 1968, the U.S. Supreme Court affirmed the school board's obligation and called into question "freedom of choice" plans that did not result in desegregation (*Green v. New Kent County*, 1968). Following *Singleton* and *Green*, federal judges dismissed school officials' claims that geographical barriers, natural or man-made, and residential segregation prevented complete desegregation. In 1970, the then Fifth Circuit Court of Appeals, by far the most activist court, opined "Barriers (geographical, roadway etc.) which did not prevent enforced segregation will not be held to prevent conversion to a full unitary system" (*Henry v. Clarksdale Municipal Separate School District* 5th Cir., 1970). Finally with its decision in *Swann v. Charlotte-Mecklenburg* (1971), the Supreme Court affirmed the power of the federal courts to order desegregation plans that utilized transportation to achieve racial balance in the schools. Later the Supreme Court stated that school boards were not required to transport students across district lines, limiting the use of what became to be referred to as "busing" in many northern and mid-western school districts with high minority school populations. For most of the South, however, where countywide districts encompassed urban, suburban, and rural areas, metropolitan desegregation plans involving busing resulted in some of the most desegregated school systems in the nation. As was suggested elsewhere, it is plausible that countywide district organization and court oversight has meant that many southern school systems have not experienced the isolation and decline in urban schools often associated with northern cities (Shircliffe, 2002).

During this period, where the courts held high standards for school board accountability in maintaining a desegregated system, demands for school choice were viewed as an impediment to integration. In part from using magnet programs to promote educational options, during the 1970s, many civil rights leaders were suspicious of school choice. Vouchers in particular were viewed negatively, and

civil rights leaders argued that providing parents with tax supported vouchers to attend private schools, first articulated by economist Milton Friedman in the late 1950s, would only serve to subsidize white parents' resistance to school desegregation. In fact, opponents successfully defeated voucher proposals of the 1970s on these grounds as well as the potential church-state issue. It is important to note that not all members of the civil rights community were opposed to establishing alternatives to the traditional public school. Even Kenneth Clark who advocated massive metropolitan desegregation and the abolition of small, thus inefficient, socially homogenous school districts, spoke of the need of establishing "alternatives" to the public education system as a way of introducing competition (Clark, 1967). However, it was not until decades later that the idea of school choice, including vouchers, reemerged in public discussions, most notably during election campaigns, as a remedy for educational disparities resulting from low performing public schools. As Friedman argued in the 1960s, contemporary voucher proponents suggest that low performing public schools would become obsolete if they had to compete with high performing public and private schools.

The contemporary movement toward school choice via charter schools, vouchers, and controlled choice plans, raises questions about school district accountability toward desegregation. Though civil rights leaders favor desegregation plans involving school choice, such as magnet programs, they are concerned about the issue of accountability once districts are relieved from court oversight and begin implementing school choice plans. Interestingly, not all school districts the courts have granted unitary status initially desired release from court oversight. For instance, Hillsborough County school officials did not initially seek unitary status when they set out to reorganize the school system because the absence of federal court supervision makes the district vulnerable to future lawsuits. Nevertheless, the trend toward court releasing districts from oversight has increased in the past decade. It is important to stress that the end of court oversight does not end a school board's responsibility to maintain a desegregated school system. The following looks at recent issues with respect to school choice and unitary status, noting implications.

Unitary Status. Desegregation monitoring, as noted, has been in the process of being phased out for the past ten years. School districts that have been under court supervision for a reasonable period of time and have shown compliance with the equal protection clause are increasingly found to have made a good faith effort to assure equity and access in schools. Miami-Dade County public school system, the nation's 4th

largest, was granted unitary status after 31 years of court oversight. U.S. District Judge William Dimitrouleas found the district's good faith commitment to the constitutional rights of students was shown in decades of compliance with court orders. Demographics reveal a majority-minority population in the district. Fifty-four percent of the 360,000 students are Hispanic, 32 percent are African American and 12 percent are white. Civil rights advocates called the ruling regressive, and stated that there will be no supervision and no control over the hiring of teachers and assigning of students on a community basis ("Florida School Desegregated, Judge Says," 2001). The Miami-Dade Case shows a major demographic trend in the nation's largest school population centers that are the results of increased racial and cultural diversity. In major population centers whites are a minority as in Los Angeles.

Federal Judge Peter J. Messitte ended 30 years of court supervision of Prince George's County School System in Maryland. In 1972 Prince George County School District was required to implement cross-county busing of more than 33,000 students to achieve racial equity. Today the county, one of the wealthiest predominantly black counties in the nation, has a population 60 percent African-American. Seventy seven percent of the school system's 77,000 students are African-American. The judge dismissed a lawsuit filled against the district by the NAACP but appointed a monitor to oversee the school district (*Arkansas Gazette*, 2002).

The Little Rock, Arkansas School District remains under a Federal Monitor. School district officials are working to achieve unitary status. Howell and Dishongh (2002) provide insights into some of the challenges in achieving unitary status. The Little Rock School District petitioned the court to declare the district unitary and release it from court supervision. A week long hearing was conducted to determine whether the state's largest school district has complied with terms of the 1998 desegregation plan, entitling the district to be released from over 40 years of federal court involvement in the district's operations. A ruling is expected by mid-November, 2002. At stake is the district's future autonomy in budgeting, school construction, student's assignments to schools as well as staffing. In addition, if the district is declared desegregated by 2004 the state will forgive a $20 million loan and continue financing magnet schools through 2008. African Americans attending the flagship Central High School told a federal district judge, Bill Wilson, Jr. that the campus is really two institutions. One made up of white students taking rigorous courses and the other comprised mainly of African Americans students taking regular courses taught by a

less nurturing faculty. Ending Federal Court Supervision will not lessen School Districts obligation to continue monitoring compliance with unitary status and desegregation requirements.

Race Choice. *Your School and the Law* (2002) reported on attacks on the Massachusetts voluntary 1965 state desegregation law. The law encouraged Lynn and other districts to adopt student assignment policies, which use race as a factor in determining where students attend schools. Questions about the legality of using race as a factor in determining where students attend school to achieve overall racial balance are being raised by some parents. In *Comfort v. Lynn School Committee* mostly white parents are suing for discrimination against their children, preventing them from attending better performing schools. When students enter Lynn's schools, parents must identify their child's race. Some racially mixed parents choose white or black depending on which they think will help them get their school choice. Fifty-eight percent of Lynn's students are minorities, while 42 percent are white. Among the minorities, 29 percent are Hispanic, 15 percent are African American and 14 percent are Asian American.

Vouchers and School Choice. As noted earlier, vouchers and school choice are current popular educational themes. The Supreme Court June 27, 2002 in a 5-4 (Sandra Day O'Connor, Antonin Scalia, Anthony Kennedy, William Rehnquist, and Clarence Thomas ruled for the majority) decision ruled that using state and federal funds for attendance at private and private religious schools does not violate the constitution. The *Zelman v. Simmons-Harris* (2002) case was limited to the Cleveland, Ohio voucher case but several states and several faith based groups sought to implement voucher programs after the court's ruling. Clint Bolick, of the Institute for Justice, who served as co-counsel before the Supreme Court, found conditions ripe for expansion of similar programs after the ruling. Lampman (2002) reported on African-American parents' discontent with inner city schools and the preference of a growing Muslim population to send their children to private religious schools, as fueling a movement toward support for extended voucher programs. Observers raise the question as to whether those seeking equal treatment in funding private religious school with government funds are willing to take equal treatment in regulation and accountability. Justice Stephen Breyer, in his strong dissent, focused on the role of the First Amendment in protecting the nation's social fabric from religious conflict. Justice David Souter is his bitter dissent noted that " public tax money will pay at a systemic level for teaching the covenant with Israel and Mosaic law in Jewish schools, the primacy of the Apostle Peter and the Papacy in Catholic schools, the truth of reformed

Christianity in Protestant schools, and the revelation to the Prophet in Muslim schools, to speak only of major religious groupings in the Republic" (Frieden, 2002; 536 U.S__. 2002). Opponents of vouchers include The National Education Association, The American Federation of Teachers, The American Civil Liberties Union, and the People for the American Way. Proponents such as Jan LaRue, chief counsel for Concerned Women for America noted that Justice Thurgood Marshall stated in Witters v. Washington (1986) "in this case, the fact that aid goes to individuals means that the decision to support religious education is made by the individual, not the state," (Green, 2002). Bush's nomination of Michael McConnell, a constitutional scholar and lead proponent of funding to religious groups, to the 10th Circuit Court of Appeals may signal a conservative shift. However, with mid-term elections nearing, and a razor thin majority in Congress, appointments to federal courts may be subjected to increased scrutiny from public school advocates. Terry M. Moe (2002), senior fellow at the Hoover Institution and professor of political science at Stanford University, believes vouchers are inevitable as democratic constituencies in inner cities demand school choice.

The battle for separation of church and state appears to be headed toward the states whose constitutions have strong first amendment protections. Florida is the home of the first statewide voucher program in the United States. Florida, according to Richard (2002), has a record number of students including those with disabilities using an expanded menu of state-financed vouchers to enroll in private schools. Florida Circuit Judge P. Kevin Davey ruled August 5 that the voucher program violates the state constitution. Governor Jeb Bush is appealing the ruling to the State Supreme Court. This suggests the next battlefield over vouchers will be in the state courts. The Associated Press (2002) reported that the Maine Department of Education and local school districts continue to enforce state law that forbids tuition payment to religious schools, according to Maine Attorney General Steven Rowe. Rowe finds the Supreme Court ruling stipulates that states may fund parochial schools, but it did not address the issue of whether they are required to do so. Advocates and opponents will continue the debate in the future. School choice advocates often equate vouchers with tuition tax credits, but tuition tax credits may help middle class taxpayers and not low-income inner city populations ("Editorial" *USA Today*, July 23, 2002). Others believe that combining tax credits with vouchers can help parents improve the quality of instruction in public schools. Tax-credit funds can be used for tutors, transportation to out of district public schools, and

help overcrowding in inner city schools. Cummings (2002) reports that President Bush has been shifting his emphasis from vouchers to tax credits which give taxpayers a break on their income taxes for money spent on school tuition. It also comes with less political challenge and pundits believe is more politically saleable. Bush still has vouchers in his message to compassionate conservatives, his power base.

Rulings and Trends: In *Johnson ex rel. Johnson v. Board of Education of Champaign Unit School District* #4 (2002), the court entered a consent decree approving a "controlled choice" plan allowing assignment of elementary students to the school of their choice anywhere in the city, subject to racial fairness guidelines, despite a claim that the plan unfairly required busing of African-American students. Opponents of the plan had objected that a shortage of classrooms in the predominantly north side of the city disproportionately imposed busing obligations on African American students. Despite the objections, the court found that all African-American students selecting schools within walking distance of home were accommodated, and plans were in place to increase north side school facilities (*School Law Reporter*, 2002).

Future. In Little Rock, as other school districts under court supervision or in unitary status, statistics are continually gathered to monitor compliance with desegregation orders. Analysis of percentage of disciplinary cases, grade assignments, achievement levels and advanced class placement are a few of the items used to determine compliance. As desegregation in the nation's schools is achieved, funds can be utilized to increase equity and access across all population groups. School districts must confront social economic and racial segregation in schools as a barrier to equity and excellence. Many districts have put forward school choice, including vouchers, charter schools, and magnet programs as a means to expand educational options to students and parents, raise academic standards and achievement, and foster desegregation.

Cobb (2002) notes that while the National Association for the Advancement of Colored People still states their commitment to desegregation, there has been a noticeable shift in the organization's focus to look at ways to improve minority students' academic performance other than maintaining a racial balance in schools. In addition, a 1998 survey by the Public Agenda Foundation revealed 80 percent of African-American parents and 88 percent of white parents viewed raising academic standards and achievement as more important for schools than integration. The relationship between raising academic achievement and school integration is often lost in such surveys, however. There is substantial evidence

that racial segregation concentrates poverty in high minority schools, and these schools tend to be low performing. Social economic and racial segregation have impeded several school districts' attempts to bolster academic standards and achievement (raise test scores). Stephen Imoff, a school board member of Jefferson County, Kentucky, has even purposed assigning students to schools on the basis of their socio-economic background so that no school has a low-income majority student body. Imoff argues limiting the number of low- income students at each school will raise test scores and student achievement. Massive use of transportation would be needed to achieve Imoff's goal, making his plan perhaps unappealing to some parents (Kenning, 2002)

Along with desegregation measures, charter schools and vouchers, more popular with parents, will continue to be debated as efforts are made to "leave no child behind." School choice advocates believe public schools will be improved with competition. Henry (2002) points to a variety of school choice options. There are some 2430 charter schools in 34 states serving 580,000 students with mixed results. Over 1, 100 magnet schools with arts, business, science and technology curriculum serve students effectively. Tutoring programs provide another student option. Deregulation, so popular in the Reagan philosophy, has led to increased competition in business and industry. Some see benefits in such a philosophy while others believe deregulation has led to ethical and moral lapses as corporate leaders seek to improve their bottom line through creative accounting. School choice efforts expand this deregulatory trend that to date has led to inconclusive results in academic achievement. The law has been a vital instrument in expanding the nation's social consciousness and providing for increased educational opportunities for minorities. In school districts that have unitary status, school officials need to assure parents and educators that they would continue the use of magnet programs to attract students outside their home communities as well as fulfill mandates of the equal protection clause. However, in the Miami-Dade school district unitary ruling, Judge Dimitrouleas while giving the district flexibility to use race-conscious measures to avoid resegregation, limited such efforts to next June and rejected an extension of that deadline (CNN.Com).

Concentrating on providing excellent education, encouraging students to succeed, to the degree possible, maximizing fiscal policy results, jawboning parents or guardians to get involved in their children's educational efforts, encouraging volunteerism, and community involvement together with court

supervision where necessary will yield positive outcomes. A perusal of the Education Law Association's *School Law Reporter* in the last few years shows a variety of creative efforts to achieve equal access and equity in school enrollment. As in *Parents Involved in Community School v. Seattle School District No 1* (2001) the court held that the school district plan for open choice served compelling governmental interests in achieving diversity and reducing the efforts of *de facto* segregation and was narrowly tailored to further those interests. Several cases deal with school assignment, which in time may take a secondary position to concentration on educational excellence and best practices for all students.

George W. Bush and Congressional Act 2001 to leave no child behind legislation will be a goal for school districts in the future. Funding problems in a cyclical economy will be a challenge requiring federal intervention. A variety of strategies to assure access and opportunity including double incentive magnet schools will be utilized in the future.

School district efforts to assure quality education for all students including minorities and students at risk continue to be a work in progress. Substantial personal changes in educational administrators, lawyers, law enforcement agencies, require school boards to represent the community in monitoring educational quality. A Harvard University Civil Rights Project, *Resegregation in American Schools* (2002) suggests a variety of strategies to assure quality education. These include community involvement through petitions, press conferences, rallies to monitor school policies after unitary status.

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